# Supreme Court of the United States

OCTOBER TERM, 1938

No. [redacted]

DAVID F. WALLER, JR., and MAYER WALLER, as Trustees under the Last Will and Testament of David F. Waller, deceased, etc.,

*Appellants,*

*against*

THE TEXAS AND PACIFIC RAILWAY COMPANY,

*Defendant-Appellee.*

## BRIEF ON BEHALF OF THE APPELLEE, THE TEXAS AND PACIFIC RAILWAY COMPANY

[redacted]

*Counsel for the Appellee, The Texas and Pacific Railway Company.*

[redacted]
New Orleans, La.

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## SUBJECT INDEX.



## CASES CITED.

STATUTES.

# Supreme Court of the United States.

DAVID J. WALLER, JR., and LEVI E. WALLER, as Trustees under the Last Will and Testament of David J. Waller, deceased, in their own behalf and on behalf of all other bondholders secured by Deed of Trust made by New Orleans, Baton Rouge and Vicksburg Railroad Company, dated the 4th day of September, 1872,

Complainants-Appellants,

AGAINST

THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS PACIFIC RAILROAD COMPANY and the UNION TRUST COMPANY OF NEW YORK,

Defendants-Appellees.

No. 363.

## BRIEF ON BEHALF OF THE APPELLEE THE TEXAS AND PACIFIC RAILWAY COMPANY.

### Statement.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a decree of the District Court of the United States for the Southern District of New

York, dismissing on the ground of limitations and laches a suit in equity brought by the appellants for the purpose of holding the defendant, The Texas and Pacific Railway Company, liable for the payment of thirty bonds of $1,000. each, with accrued interest, issued by the New Orleans, Baton Rouge and Vicksburg Railroad Company in September, 1872, and due and payable September 1, 1902, and secured by Deed of Trust by the said Baton Rouge Railroad Company to the Union Trust Company of New York, as Trustee, on all of the property of the said Baton Rouge Railroad, including certain Land Grants given it by Congress (see Opinion of District Judge Evans, Record, p. 336), which facts are approved in the opinion of Judge Coxe of the United States Circuit Court of Appeals (see Record, p. 347).

This suit as originally brought, made the Union Trust Company of New York as Trustee, a party defendant and the New Orleans Pacific Railroad Company a party defendant. Before final hearing in the United States District Court of The Southern District of New York, the bill was dismissed as to the Union Trust Company of New York, and no subpœna has ever been issued, served or returned as to the New Orleans Pacific Railroad Company so that the New Orleans Pacific Railroad Company has never been made a party to the record, nor does the decree undertake to adjudicate any of its rights in the premises, so that the sole defendant in the Court below was the The Texas and Pacific Railway (see Printed Record, p. 54).

At the outset, by reason of the important bearing which the point has upon the defense of limitations and laches, it is respectfully urged that the

record does not contain the necessary proof that the Baton Rouge bonds were ever lawfully issued so as to become the binding obligations of the Baton Rouge Company. The only evidence offered in that behalf was the following:

FIRST. That a mortgage or deed of trust purporting to have been executed by the Baton Rouge Company to the Union Trust Company of New York, as Trustee, dated September 4, 1872, and providing for an issue of land grant bonds, was placed upon record in certain parishes in the State of Louisiana, and in the Department of the Interior (Record, pp. 80, 81).

SECOND: That the Trustee's certificate affixed to each of the alleged obligations described in the Bill of Complaint as bonds of the Baton Rouge Company, bore the genuine signature of Mr. Frothingham, who in 1872 was President of the Union Trust Company of New York, Trustee of the alleged mortgage, and that the records of the Union Trust Company indicated that bonds in the amount of $1,275,000 had been certified by the Trustee (Record, pp. 56-57).

It is, of course, unnecessary to point out to this Court that the bonds are issued by the obligor and not by the mortgage trustee, and that the Trustee's certificate affixed to the alleged Baton Rouge bonds serves merely to identify the same as belonging to the series entitled to the benefit of the mortgage security *if and when* validly issued and put in circulation by the Baton Rouge Company.

While it is known that certain alleged Baton Rouge bonds were at one time in the hands of persons claiming to be owners of the same, it is certainly very doubtful whether any bonds were

ever lawfully put into circulation. In this connection, it may be noted that as late as 1891 Mr. Justice BROWN in his opinion in the case of *New Orleans Pacific Railway Company* vs. *Parker,* 143 U. S. 42, speaking with respect to this particular security, says (p. 44):

> "* * * on September 4, 1872, one Allen, assuming to act as President of the Baton Rouge Company, also executed a mortgage to secure the payment of 12,000 bonds, *which, however, appears never to have been issued.*" (Our italics.)

It is therefore not unreasonable for the Texas and Pacific Railway Company to insist that the issue of these alleged Baton Rouge bonds must be established by strict legal proof.

Mr. Levi E. Waller, one of the appellants, testified that the Baton Rouge bonds described in the complaint were found among his father's effects at the time of his death in 1893, and that he *thought* that his father had owned them about seven or eight years (Record, p. 56).

How the elder Waller came into possession of the alleged bonds is not disclosed. Such knowledge as the elder Waller may have had as to the manner in which the alleged bonds were put in circulation has been lost by his death. Why the elder Waller failed for over a period of eight years to attempt to enforce the alleged bonds must therefore be left to conjecture.

There being no evidence that the issue of a single Baton Rouge bond was ever authorized by the Baton Rouge Company, no evidence that a single Baton Rouge bond was ever signed by an officer of the Baton Rouge Company, no evidence that a single Baton Rouge bond was ever sold, pledged or other-

wise disposed of or put in circulation by any person having actual or apparent authority to represent the Baton Rouge Company, it is submitted that the decree may properly be affirmed without reference to any of the questions presented in the appellant's brief, all of which presupposes that the alleged bonds described in the complaint are outstanding, valid and binding obligations of the Baton Rouge Company.

In order, however, that the Court may fully understand appellants' alleged cause of action and in order that the position of The Texas and Pacific Railway Company may be presented in its full strength, it seems desirable to state as briefly as possible

## The History of the Baton Rouge Land Grant.

Although the facts are stated in some detail in the opinion of District Judge EVANS, see Record 336 a further statement, arranging the facts in chronological order, may be helpful.

The Baton Rouge Company was incorporated by Special Act of the General Assembly of Louisiana effective December 30, 1869, with authority to construct a railroad between New Orleans and Shreveport in the State of Louisiana (Acts of 1870; p. 7, Act 43; record, p. 206).

On October 1, 1870, the Baton Rouge Company executed a mortgage to the Union Trust Company of New York, as Trustee, to secure an issue of bonds to an authorized amount of $6,250,000. Certain of these bonds got into circulation, were de-

faulted and were in litigation in the cases, among others, of *New Orleans Pacific Railway Company* vs. *Union Trust Company,* 41 Fed. Rep., 717, and *New Orleans Pacific Railway Company* vs. *Parker,* 143 U. S. 42. These cases may be consulted for further historical details with reference to the land grant.

On March 3, 1871, the Act of Congress approved March 3, 1871, incorporating the Texas Pacific Railroad Company became effective (16 Stat. at Large, p. 573). Section 22 of this Act provides

> "That the New Orleans, Baton Rouge and Vicksburg Railroad Company chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said Company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria in said State, to connect with said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said Company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this Act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor and opened for settlement and preemption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within State of California; provided that said Company shall complete the whole of said road within five years from the passage of this act."

By Section 9, the grant of California lands to the Texas Pacific Railroad Company, to which reference is made in Section 22, is of

> "* * * ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

By Section 12, it is further provided that

> "Said Company, within two years after the passage of this Act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the territories and twenty miles within the State of California, to be withdrawn from pre-emption, private entry and sale."

On November 11, 1871, the Baton Rouge Company, pursuant to the provisions of Section 12 above mentioned, filed with the Department of the Interior, a map designating the general route of its proposed road from Baton Rouge to Shreveport (Record, p. 144). This was followed by an order of the Land Commissioner dated November 28, 1871, withdrawing from pre-emption, private entry or sale, odd numbered sections of land within thirty mile limits of the proposed road (Record, p. 83).

*It may be observed, however, at this point that*

*the map so filed by the Baton Rouge Company was not a map of definite location, and that the filing of the map conferred upon the Baton Rouge Company no rights whatever with respect to the lands affected by the Commissioner's order.*

This proposition will be developed in the course of the argument.

On September 4, 1872, the Baton Rouge Company acting by Calvin H. Allen, claiming to be its President, executed to the Union Trust Company of New York, as Trustee, the mortgage involved in the present suit, which mortgage provides for an issue of bonds to an authorized amount of $12,000,000 and purports to cover all of the property of the Baton Rouge Company, including (Record, p. 64),

> "all the right, title, interest, claim, estate and demand whatsoever which the said Railroad Company or its successors now has or may at any time hereafter acquire, or become in any way entitled to, of, in and to all the lands and sections of lands situate, lying and being on either side of the said railroad as the same may be finally located and constructed, in accordance with and as granted by the Act of Congress entitled 'An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes,' approved March 3, 1871; and also all the right of way granted by the State of Louisiana or by the United States" (Record, pp. 57-80).

After execution of the alleged mortgage of September 4, 1872, the Baton Rouge Company, so far as the record discloses, was practically dormant for a period of nearly ten years. As already

noted, there is no evidence that the Company ever issued any bonds under the mortgage, and it is established by the various documents offered in evidence that the Baton Rouge Company never definitely located its projected railroad, never constructed any part of its projected railroad, and never took any steps necessary to enable it to earn the land grant authorized by Section 22 of the Act of March 3, 1871. (Opinion of General Attorney Brewster, record, pp. 207, 209, 210; letter of Secretary Teller to President Arthur, dated March 13, 1883, and exhibits filed therewith, record, p. 226; *New Orleans Pacific Railway Company* vs. *Parker*, 143 U. S. 42, *supra.*)

On December 29, 1880, the Board of Directors of the Baton Rouge Company adopted a resolution authorizing the President and Secretary of the Company to transfer to the New Orleans Pacific Railway Company, a corporation organized under the laws of Louisiana, with power also to construct a railroad betweeen New Orleans and Shreveport, all of the right, title and interest of the Baton Rouge Company in and to the land granted to said Company by the Act of Congress approved March 3, 1871 (Record, pp. 84, 85). Acting under this authority, the proper officers of the Baton Rouge Company executed the assignment of the land granted, dated January 5, 1881, a copy of which assignment is annexed to the Answer of the Texas and Pacific Railway Company as Exhibit A (Record, p. 222), and reads as follows:

> "This indenture, made the fifth day of January, one thousand eight hundred and eighty-one, betweeen the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corpora-

tion created and existing under and by virtue of a special act of the legislature of the State of Louisiana, approved December 30th, 1869, party of the first part, and the New Orleans Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Louisiana, party of the second part, witnesseth—

That the said party of the first part, for and in consideration of the sum of one dollar lawful money of the United States of America to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is thereby acknowledged, and of other good and valuable consideration, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim unto the said party of the second part and to its successors and assigns forever.

All the right, title and interest of the said party of the first part, its successors or assigns of, in, or to a certain grant of public lands granted to the said party of the first part by an act of the Congress of the United States, approved March 3d, 1871, and entitled 'An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes,' together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

In witness whereof the said party of the first part hath caused its corporate seal to be

hereunto affixed, and these presents to be signed by its president and secretary, the day and year first above written.

W. H. BARNUM, President
WM. M. BARNUM, Secretary.

Sealed and delivered in
the presence of
CHAS. L. BEAMAN,
CHAS. EDGAR MILLS,
CHARLES NETTLETON, [SEAL]
Commissioner for Louisiana in New York.

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this 5th day of January, A. D. 1881, before me, CHARLES NETTLETON, a commissioner of the State of Louisiana in New York, residing in said City of New York, personally appeared WILLIAM H. BARNUM, president, and WILLIAM M. BARNUM, secretary, to me well known to be the individuals named in, and who executed, the foregoing instrument, and acknowledged to me that they did sign, seal, and deliver the same as their free act and deed on the day and year therein mentioned, and for the consideration, uses, and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal this 5th day of January, A. D. 1881.

(SEAL) CHARLES NETTLETON
Commissioner for Louisiana in New York,
117 Broadway N. Y. City."

At the next meeting of the Stockholders of the Baton Rouge Company, the action thus taken by the Board of Directors and officers was approved,

ratified and confirmed, the transfer of the land grant having been previously accepted both by the New Orleans Pacific Railway Company and by the Department of the Interior (Record, pp. 87, 88, 93).

The New Orleans Pacific Railway Company thereupon proceeded to construct its road and earn the land grant (Record, p. 172).

As we understand the appellant's position, they now contend that the grant to the Baton Rouge Company being in the nature of a grant *in presenti,* as distinguished from a grant *in futuro,* or mere promise of a grant, fee simple title to the granted lands at once vested in the Baton Rouge Company and became subject to the lien of the alleged mortgage of September 4, 1872. In support of this position the appellants in their brief below appear to rely largely upon expressions found in briefs filed by Judge Dillon and others in the Interior Department and before Committees of Congress (Brief, pp. 19 *et seq.*). If, and in so far as these expressions support the position of the appellants, they conflict with opinions of the Attorney General and of the Supreme Court.

Attorney General Brewster in his opinion dated June 13, 1882 (Record, p. 213), says:

> "But the grant thus made is in the nature of a float. It is of sections to be afterward located, their location depending upon the establishment of the line of the road. Until this is definitely fixed the grant does not attach to any specific tracts of land. Upon the line of the road being definitely located, the grant then first acquires precision, and the Company becomes invested with an incohoate title to the particular lands covered thereby, which can ripen into a perfect legal title only

> as the construction of each section of twenty miles of road is completed and approved, when the right to patents for the lands opposite to and coterminus with such constructed sections accrues."

Similarly, Mr. Justice BROWN in *New Orleans Pacific Railway Company* vs. *Parker*, 143 U. S., says (p. 57):

> "As the grant was, by Section 9, of the lands not sold, reserved or otherwise disposed of at the time the route of the road was definitely fixed, it is settled in this Court that the title to any particular lands would not pass until the line was so located, because until that time it could not be definitely ascertained what lands had been otherwise disposed of."

On October 27, 1881, and November 17, 1882, the New Orleans Pacific Railway Company filed with the Department of the Interior maps of constructed road between New Orleans and Shreveport aggregating 328 miles, all of which except 68 miles acquired by purchase, had been constructed by the New Orleans Pacific Railway Company. This mileage had been previously examined by a Commissioner representing the Department of the Interior, who reported that all portions of the line were constructed in substantial compliance with the law and the instructions of the Department. On March 13, 1883, the Commissioner's reports were submitted to President Arthur by Secretary Teller, with the recommendation that said 328 miles of road, exclusive of the 68 miles acquired by purchase, be accepted and that patents for such lands as may have been earned by the construction be issued to the New Orleans Pacific Railway Company upon its compliance with the law

and regulations in such case made and provided. On March 16, 1883, the Secretary's recommendations were approved by the President (Record, pp. 227-229).

On May 22, 1883, Acting Land Commissioner Harrison, referring to the action of the President, advised the New Orleans Pacific Railway Company that the Interior Department in adjusting the land grant would treat the dates of the filing of the two maps heretofore mentioned, October 27, 1881, and November 17, 1882, as the dates of the definite location of the road (Record, pp. 139-142). These dates of definite location were accepted by the New Orleans Pacific Railway Company, and from time to time thereafter patents were issued to the New Orleans Pacific Company (Record, pp. 138, 230).

On April 16, 1883, the New Orleans Pacific Railway Company executed to John F. Dillon and Henry M. Alexander as Trustees, a mortgage or deed of trust upon the lands embraced in the land grant in question, to secure an issue of bonds to be known as its "Land Grant and Sinking Fund Bonds" (Record, p. 257). This instrument was modified by Supplemental Indenture dated January 5, 1884, so as to permit the issuance of bonds in advance of the execution of patents for the granted lands (Record, p. 286). The Land Grant and Sinking Fund Bonds were not direct obligations of the New Orleans Pacific Railway Company, but were payable only out of the proceeds of sale of mortgaged lands, it being provided in the mortgage that the lands should be sold from time to time by the mortgage trustees.

In discharging their trust, particularly in connection with sales of the land, the mortgage trustees found themselves embarrassed by reason of claims

asserted on behalf of persons, claiming to hold bonds of the Baton Rouge Company issued under the alleged mortgages of October 1, 1870, and September 4, 1872. Although the title of the New Orleans Pacific Railway Company was expressly confirmed by the Act of Congress approved February 8, 1887, hereinafter referred to, the trustees in order further to quiet their title to land grant, and that of their grantor, brought suit in the United States Circuit Court for the Eastern District of Louisiana in 1890 naming as defendants

New Orleans Pacific Railway Company,
New Orleans, Baton Rouge and Vicksburg Railroad Company,
Certain individuals claiming to be bondhoders, and
Union Trust Company of New York, as trustee of the alleged mortgages of October 1, 1870, and September 4, 1872.

The Union Trust Company was duly served with process, but failed to appear, suffering the entry of a decree *pro confesso*. This decree which the Texas and Pacific Railway Company has pleaded, as a complete bar to the prosecution of the present suit, adjudges among other things,

> "* * * that the said mortgages made unto the complainant constitute a valid and first lien on all the lands granted by said Act of Congress of 1871, and confirmed by the said Act of 1887; and that the mortgage made on behalf of the New Orleans, Baton Rouge and Vicksburg Railroad Company by Calvin H. Allen, appearing as its President before J. T. Beck, Notary, at New Orleans, September 4, 1872, unto the Union Trust Company of New York * * * did not and does not cover,

attach to mortgage, hypothecate or affect the lands patented by the United States to the New Orleans Pacific Railway Company, March 3, 1885, under said Act of Congress of March 3, 1871, Chapter 122, or any part thereof, or any of the lands patented to the said New Orleans Pacific Railway Company since March 3, 1885, under said Acts of 1871 and 1887 or selected or due under said laws and creates no lien thereon or right in or to the same or any part thereof." (Record, pp. 231 *et seq.*)

The Texas and Pacific Railway Company was not a party to the above suit, but, as it is sought to be held liable for payment of the Baton Rouge Bonds only by reason of its alleged assumption of the obligations of the New Orleans Pacific Railway Company, it claims the right to plead any judgment or interpose any defense which would be available to the New Orleans Pacific Company.

In this connection, it is important to point out precisely the relation existing between the New Orleans Pacific Railway Company and The Texas and Pacific Railway Company. That relation is defined and established by written instrument a copy of which is annexed to the answer of the Texas and Pacific Railway Company marked Exhibit B (Record, p. 50) which reads as follows:

ARTICLES OF CONSOLIDATION

NEW ORLEANS PACIFIC RAILWAY CO.

WITH

THE TEXAS & PACIFIC RAILWAY CO.

JUNE 20TH, 1881.

THIS INDENTURE, made this 20th day of June, in the year of our Lord one thousand eight hundred

and eighty-one, by and between the NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation created by, and under the laws of the State of Louisiana, party of the first part, and THE TEXAS & PACIFIC RAILWAY COMPANY, a corporation created by and under the laws of the United States, and having and owing certain franchises under the laws of Texas party of the second part.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States, to it in hand paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the other and further consideration hereinafter to be mentioned, hath consolidated itself with the party of the second part under its own proper and corporate name of "The Texas & Pacific Railway Company", on the terms and conditions herein and hereby agreed upon, by granting, bargaining, selling, aliening, remising, releasing, conveying and confirming, and by these presents granting, bargaining, selling, aliening, remising, assigning, transferring, conveying and confirming unto the party of the second part, its successors or assigns, all the franchises, corporate rights or privileges of the said party of the first part, together with its track, roadbed, buildings, rolling stock, engineers' tools, bonds, stocks, grants, privileges, property, real and personal, and every right, title and interest in and to any franchises or property, real or personal, and all rights, of every name and kind which the party of the first part has any right, privilege or interest, situated and being in the State of Louisiana, or in the State of Texas, or elsewhere: The

object and intent of this contract and agreement being to so merge the rights, powers and privileges of the party of the first part into the party of the second part, so that the party of the second part, under its own charter, corporate name and organization, shall, without impairing any existing right, exercise in addition thereto all the powers, rights, privileges and franchises, and own and control all the properties that the party of the first part now exercises and owns, or by its charter and by-laws it has the right to exercise, own or control.

Provided, however, that the land and land grants acquired or to be acquired by the party of the first part from the government of the United States, either directly or indirectly, or from the State of Louisiana, or from the New Orleans, Baton Rouge & Vicksburg Railroad Company, or from any other source, other than lands necessary and needful for railway purposes, are expressly exempted and excluded from the provisions of this contract, and do not pass by any terms or provisions thereof.

And provided further, that the franchises of the party of the first part (to be and remain a corporation until such time as may hereafter be agreed upon for its dissolution) shall not be impaired or infringed upon by anything contained in this contract.

And provided, also, that nothing in this contract contained is intended to, or shall impair any legally existing contract by mortgage or otherwise, of the party of the first part.

The further consideration for this contract and agreement is, that the party of the second part shall receive from the party of the first part, or its shareholders, share for share of its capital stock of one hundred dollars per share, issued or to be

issued (not exceeding the rate of twenty thousand dollars per mile, for 400 miles of road, which, it is estimated, will be constructed under the existing franchises of the party of the first part); that is to say: The party of the second part shall deliver to the party of the first part, or to such person as the latter shall direct, or to its stockholders, one share of its capital stock of one hundred dollars per share, for a like amount of the capital stock of the party of the first part now outstanding, when and as transferred to the party of the second part, and as further stock of the party of the first part is issued (not exceeding twenty thousand dollars per mile, as aforesaid) similar exchanges and transfers shall be made until all the stock of the party of the first part (not exceeding the rate per mile as aforesaid) shall have been issued.

Provided that the stock of the party of the first part received by the party of the second part in exchange, under this agreement, shall not be canceled, but shall be held and used by the party of the second part for the purpose of preserving to the said second party the enjoyment of all rights and privileges pertaining to the ownership thereof, until otherwise provided by authorized corporate action, the corporate existence of the party of the first part shall be maintained, and its power to carry out all existing contracts, and to mortgage any land grant it has acquired, or may acquire, from the New Orleans, Baton Rouge & Vicksburg Railroad Company or otherwise, remain wholly unimpaired hereby.

In witness whereof, the parties aforesaid, being the contracting parties of the first and second part, have mutually executed this indenture, under the corporate seals of the said Companies, and attested

by the signatures of the proper officers, the day and date above.

TEXAS & PACIFIC RAILWAY CO.
By JAY GOULD, President
[L. S.] Attest, C. E. SATTERLEE, Secretary
NEW ORLEANS PACIFIC RAILWAY CO.
By E. B. WHEELOCK, President
[L. S.] Attest, WM. S. NICHOLSON, Secretary

Recorded, and original filed in office of Secretary of State of the State of Louisiana, June 28, 1881.

By the terms of this instrument, which bears date June 20, 1881, the Texas and Pacific Railway Company in consideration of the issue of its own stock at the rate of $20,000 per mile, acquired the lines of railroad constructed and in process of construction by the New Orleans Pacific Railway Company; it will be noted that the instrument expressly provides, however,

> "that the land and the land grants acquired or to be acquired by the party of the first part (New Orleans Pacific Railway Company) from the Government of the United States, either directly or indirectly, or from the State of Louisiana or from the New Orleans, Baton Rouge and Vicksburg Railroad Company or from any other source, other than lands necessary and needful for railway purposes, are expressly exempted and excluded from the provision of this contract and do not pass by any terms or provisions thereof" (Record, p. 51).

The foregoing statement is not intended as a complete summary of all the documents in evidence, some of which the District Court found "so remote as to fall outside of any reasonable limit", but is intended merely to present in narrative form the

salient facts set out under the four following defences specially pleaded in the answer of the Texas and Pacific Railway Company:

1. That the Baton Rouge Company never acquired title to the land grant lands, and that its alleged mortgage of September 4, 1872, never became operative as a lien thereon (Record, pp. 30[illegible]).

2. That prosecution of the action is barred by the decree of the Circuit Court of the United States for the Eastern District of Louisiana in the suit of Dillon and Alexander against the New Orleans Pacific Railway Company and others (Record, pp. 39-44).

3. That the Texas and Pacific Railway Company is in no way connected with the land grant or the transactions referred to in the complaint (Record, pp. 44-46).

4. That the suit is barred by limitations and by the laches of the complainants (Record, p. 47).

For the purpose of this examination, we will discuss the above propositions in their reverse order, taking up first the question of limitations and laches which was the basis of the decision of the learned District Court dismissing the bill and which was also the decision of the learned U. S. Circuit Court of Appeals affirming the judgment of the court below.

## Argument.

### I.

1. "Equity aids the vigilant, not those who slumber on their rights."
2. "A Court of Equity which is never active in relief against conscience or public convenience has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth a Court of Equity in activity, but conscience, good faith and reasonable diligence."
3. The plaintiffs and their testator having delayed action upon the alleged Baton Rouge bonds beyond the period of limitations prescribed by the statutes of both New York and Louisiana, and beyond that period demanded by good faith, prosecution of the suit is barred by lack of diligence and laches.

The appellee, Texas and Pacific Railway Company, avers in its answer as a special defense to the prosecution of the alleged cause of action that

> "The plaintiffs and their predecessors in title to the bonds upon which this cause is attempted to be founded, have made no timely and diligent effort to question the transactions referred to in the complaint herein or the title of the New Orleans Pacific Railway Company or its grantees to the lands granted by the 22nd Section of the Act of Congress approved March 3, 1871, and are guilty of such lack of diligence and of such laches in the premises that no complaint may now be made in respect

of said bonds or the matters and things referred to in the bill of complaint herein" (Record, p. 47).

The appellants contended in Court below that this defense is not broad enough to cover limitations.

"The defendant did not plead the statute of limitations of either New York or Louisiana. Hence it cannot be urged as a bar."

The appellee does not even admit that the above defense would not be a good plea of limitations in a common law action.

It is, however, well settled that the statute of limitations as enforced in equity need not be specially pleaded; indeed it has been the practice of Federal Courts sitting in equity to apply the statute of limitations on hearings on demurrer. The following cases may be consulted:

*Harpending* vs. *The Dutch Church,* 16 Pet. 455.

*Badger* vs. *Badger,* 2 Wall. 87.

*Coddington* vs. *Railroad Company,* 103 U. S. 409.

*Metropolitan Bank* vs. *St. Louis Dispatch Company,* 149 U. S. 436.

In the case first cited Judge CATRON says:

"It is insisted that the act of limitations is not relied on by express reference to the Statute of New York. We think it was unnecessary to rely in terms on the statute. It was more convenient not to do so. The bill seeks discoveries, the right to have which twenty years' adverse possession could only bar. It also seeks an account of the proceeds of sales of parts of the estate and an account of the rents

> and profits of other parts, assuming the respondents to be trustees for the complainants. To this aspect of the bill six years forms a bar to a decree. *The Court is judicially bound to take notice of the statutes when the facts are stated and relied on as a bar to further proceedings if they are found sufficient"* (Our italics.)

In *Badger* vs. *Badger,* the Supreme Court, speaking by Mr. Justice GRIER, said (p. 95):

> "The party who makes such appeal should set forth in his bill specifically what impediments there were to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, *without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."* (Our italics.)

These authorities disposed of the claim that the defence of limitations is not sufficiently pleaded in the appellee's answer, as well as the claim that the appellee as a foreign corporation cannot plead the statute of limitation; the statute is always enforced in equity without reference to the rules of common law pleading or technical statutory requirements.

(a) *The suit is barred by the Statutes of Limitation in force in New York and Louisiana.*

The alleged bonds of the Baton Rouge Company do not purport to be obligations of the Texas and Pacific Railway Company.

The appellee, the Texas and Pacific Railway

Company, is sought to be held liable in this suit on the theory that payment of the alleged bonds was in some manner assumed originally by the New Orleans Pacific Railway Company and ultimately through the latter by the Texas and Pacific Railway Company. Thus the learned District Court (Record, p. 341):

> "* * * concluded that any such liability, if it exist at all, must be one that is secondary in character and resulting from some trust *ex delicto* to be implied (if such implication can arise) from some state of fact shown and not upon any direct undertaking by the New Orleans Pacific Company or the defendant to pay the debt of another, to wit, the Baton Rouge Company."

Section 381 of the New York Code of Civil Procedure prescribes a twenty-year limitation for actions upon sealed instruments.

Section 382 prescribes a six-year limitation for

> "1—an action upon a contract liability, express or implied * * *"

and for certain other actions specified in the section.

Sections 383-387 prescribe shorter periods of limitations for various actions not here material.

Section 388 provides that

> "An action the limitation of which is not specially prescribed under this or the last title, must be commenced within ten years after the cause of action accrues."

Section 390*a* provides that

> "Where a cause of action arises outside of this State, an action cannot be brought in a Court of this State to enforce such cause of

> action after the expiration of the time limited by the laws of the State or country where the cause of action arose for bringing an action upon said cause of action, except where the cause of action originally accrued in favor of a resident of this State."

By Article 3544 of Merrick's Louisiana Code ten years is the period of prescription for all personal actions excepting those for which a shorter period is provided.

Obviously the liability sought to be enforced against The Texas and Pacific Railway Company by reason of its alleged consolidation with the New Orleans Pacific Company arises, if at all, not upon the bonds as sealed instruments of the Texas and Pacific Railway Company, which they do not purport to be, but upon a "contract obligation, express or implied," a liability which is barred in six years by Section 382 of the New York Code.

Suit upon such a cause of action at the very latest should have been commenced within six years after the maturity of the alleged Baton Rouge bonds, on September 4, 1902. The suit was, however, not commenced until May, 1913, more than ten years after the maturity of the alleged bonds. This is beyond the period of limitation prescribed both by Sections 382 and 388 of the New York Code, as well as Article 3544 of the Code of Louisiana. The contention of the appellants that the statutes of limitation are inapplicable because the suit is brought to enforce an express trust might conceivably be made if the suit were against the mortgage trustee to enforce the trusts of the mortgage, but we fail to see its application to a suit against the Texas and Pacific Railway Company under the facts in this case.

(b) *The suit is barred by the laches of the Plaintiffs and their testator.*

It may be conceded that the right of the plaintiffs to foreclose the alleged Baton Rouge mortgage or to seek equitable relief against the Baton Rouge Company might properly be entertained in a court of equity so long as the principal obligation of the bond remained enforceable at law. But such is not this case. This suit is brought to enforce what in any aspect is only an implied liability, one which in the nature of things ought to be asserted promptly and not delayed until the transaction is obscured by lapse of time and evidence lost by the death of witnesses and changes in the value of the property.

*Jenkins* vs. *Pye*, 12 Pet. 251.
*Marsh* vs. *Whitmore*, 21 Wall. 178.
*Brown* vs. *County of Buena Vista*, 95 U. S. 157.
*Speidel* vs. *Henrici*, 120 U. S. 377.
*Galliher* vs. *Cadwell*, 145 U. S. 368.
*Foster* vs. *Mansfield, Coldwater and Lake Michigan Railroad Company*, 146 U. S. 88.
*Patterson* vs. *Hewitt*, 195 U. S. pp. 309-317.
*O'Brien* vs. *Wheelock*, 184 U. S. 450-493.

In the case of *Brown* vs. *County of Buena Vista*, the Supreme Court, speaking by Mr. Justice SWAYNE, said (p. 161):

> "Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this Court (*Smith* vs. *Clay*, Amb. 645. See also Story, Eq. Jur., sect. 1520*a*; 94 U. S., *supra; Sample* vs. *Barnes*, 14 How. 70; *Walker et al.* vs. *Robbins et al.*, *id.*, 584; *Creath's Administrator* vs. *Sims*, 5 *id.*, 192;

*Bateman* vs. *Willoe,* 1 Sch. & Lef. 201; *Murray* vs. *Graham,* 6 Paige (N. Y.), Ch. 622; *Callaway* vs. *Alexander,* 8 Leigh (Va.), 112; *Powell* vs. *Stewart,* 17 Ala. 719; *Riddle* vs. *Barker,* 13 Cal. 295).

"The law of laches, like the principle of limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

In the case last cited, the Supreme Court, speaking by Mr. Justice BROWN, said (p. 99):

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath and hard to disprove, and hence the tendency of Courts in recent years has been to hold the plaintiff to a rigid compliance with the law, which demands not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

In the case of *Patterson* vs. *Hewitt,* 195 U. S. p. 317, the Supreme Court, speaking by Justice BROWN, said:

"The defense of laches which permitted dismissal of the bill in this case has so often been made the subject of discussion in this Court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required in all systems of jurisprudence. In actions at law the question of diligence is determined by the words of the Statute. If an action be brought a day before the statutory

term expires, it would be sustained; if a day after, it would be defeated. In suits in equity the question is determined by the circumstances in each particular case. * * * True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as the diligence in availing himself of the means of knowledge within his control, are all material to be considered on the question whether the suit was brought without unreasonable delay."

The Supreme Court say in discussing the matter of diligence "Indeed in some cases, the diligence required is measured by months rather than by years (citing authorities) and in others a delay of two, three or four years has been fatal (citing authorities)".

As already pointed out, Mr. Waller testified that the bonds were found among his father's papers upon his death in 1893, and that he *thought* his father had owned them for seven or eight years (Record, p. 56). Each of the bonds had 52 coupons attached, indicating non-payment of interest since September 4, 1876 (Record, p. 5). At any time during the lifetime of the elder Waller he was at liberty to call upon the trustee of the alleged Baton Rouge mortgage to institute foreclosure proceedings, and upon its failure to do so, to institute proceedings in his own name and in his own right as a bondholder, naming the trustee as a party defendant; at liberty also to bring in either the New Orleans Pacific Railway Company or the Texas and Pacific Railway Company, or both, to enforce

against either or both of them any secondary liability. This the elder Waller failed to do over a period of seven or eight years. After his death his executors and trustees remained quiescent for more than *twenty* years, when after the loss of the evidence which the elder Waller alone could give as to the source and origin of his title, if any, to the alleged bonds, suit is commenced against the Texas and Pacific Railway Company, a stranger to the transaction, without offering any evidence as to the legality of the alleged bonds which have been in default nearly *40* years and without suggesting any fact in excuse of their delay, excepting that they did not learn of the consolidation of the Texas and Pacific Railway Company and the New Orleans Pacific Company and the prior adjudication against the mortgage trustee until 1909 (Record, p. 56). It appears, however, that the agreement of consolidation was a matter of public record and the fact of the consolidation was a matter of general public knowledge which might readily have been ascertained by reference to any standard publication of railroad statistics; and, moreover, as shown by the testimony of Major Abrams, the Texas and Pacific Railway Company was openly and notoriously in possession of the railways of the New Orleans Pacific Company, paying taxes and exercising the rights of ownership for a period of more than thirty years prior to the institution of the present suit (Record, pp. 344-6). The plea of ignorance is therefore entitled to but slight weight; but, accepting it at its face value, it offers no excuse for the failure of the elder Waller or of the plaintiffs themselves, to pursue their remedies against the Baton Rouge Company or the New Orleans Pacific Company. Certainly there is no analogy to the case

of *Boyd* vs. *The Northern Pacific Railroad Company and others,* 228 U. S. 482, upon which the appellants rely. In that case the Court found as a fact (p. 509) that the plaintiff's delay was not the result of inexcusable neglect.

> "* * * but in spite of diligent effort to put himself in the position of a judgment creditor of the Coeur D'Alene so as to be able to proceed in equity to collect his debt. He accomplished this result only after protracted litigation beginning in 1887 and continuing through the present appeal (1913)."

## II.

**The appellee, The Texas and Pacific Railway Company, is in no manner connected with the transactions referred to in the complaint and in no way liable for any obligation of either the New Orleans Pacific Railway Company or the New Orleans, Baton Rouge and Vicksburg Railroad Company.**

No attempt was made by the appellants to establish any direct connection between the Baton Rouge Company and the Texas and Pacific Railway Company.

The suit is brought against the Texas and Pacific Railway Company solely by reason of the agreement of June 20, 1881, annexed to the answer of the appellee as Exhibit B (Record, p. 50). This instrument transfers to the Texas and Pacific Company the *railroad* properties of the New Orleans

Pacific Company. By its express terms, the land grant is excluded from the operation of the instrument and reserved to the New Orleans Pacific Company; and it has continued under the control of the New Orleans Pacific Company and its grantees up to the present time; in fact, no patent for the land grant lands was issued until 1885, four years after the transaction between the Texas and Pacific Railway Company and the New Orleans Pacific Railway Company took place, and all patents were issued directly to the New Orleans Pacific Railway Company (Record, p. 230). The learned District Court in its opinion says (Record, p. 339):

> "There was a consolidation of the New Orleans Company and the Texas Pacific Railroad Company, from which resulted the defendant the Texas and Pacific Railway Company, and the latter Company became bound to pay all of the then existing indebtedness of the New Orleans Company, though unless inferentially it did not become bound to pay those of the Baton Rouge Company."

This statement is evidently made upon the mistaken assumption that the Texas and Pacific Company and the New Orleans Pacific Company were consolidated pursuant to the provisions of Sections 1, 4 and 6 of the Act of March 3, 1871.

An examination of these sections will satisfy the Court that they are not applicable.

Section 1 authorizes the Texas and Pacific Company to construct its line from Marshall, Texas, *westwardly* to the Pacific Ocean.

Section 4 authorizes the Texas and Pacific Company to consolidate with any Company thereto-

fore chartered by Congressional, State or Territorial authority *on the route prescribed in Section 1 of the Act.*

Section 6 prescribes that in any consolidation made under Section 4 the indebtedness or other obligations of the Company with which the consolidation is effected shall be assumed by the Texas and Pacific Company.

The lines of the New Orleans Pacific Company were not upon the route prescribed by Section 1 of the Act; they were not acquired by the Texas and Pacific Company under authority of Section 4 and did not pass to the Texas and Pacific Company upon the conditions prescribed in Section 6. The lines were acquired by the Texas and Pacific Company in the exercise of franchises which it had acquired by consolidation with the Southern Pacific Railway Company of Texas and the Southern Transcontinental Railway Company, which companies were authorized to acquire by purchase lines extending *eastwardly* to the Atlantic seaboard, these consolidations having been effected under the laws of Texas and ratified on the part of Congress by Act approved June 22, 1874 (18 Stat. at Large, 197).

The only obligation assumed by the Texas and Pacific Company under the agreement of June, 1881, was the express obligation to pay for the railroad of the New Orleans Pacific Company through the issue of its own stock at the rate of $20,000 per mile; and any attempt to superadd to that obligation an undertaking to assume the indebtedness and liabilities of the New Orleans Pacific Company is clearly inadmissible, especially so when the alleged implied or superadded liability

is asserted in respect of land grant lands which, by express provisions of the instrument, never passed to the Texas and Pacific Company, but were reserved and held by the New Orleans Pacific Company.

## III.

**The decree of the United States Circuit Court for the Eastern District of Louisiana in the case of John F. Dillon and Henry M. Alexander, Trustees, against the New Orleans Pacific Railway Company and others is a bar to the prosecution of this suit.**

The appellants stated in their brief in court below:

> "The first question involved in this case is, whether or not the mortgage or deed of trust executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company to the Union Trust Company of New York to secure the payment of bonds sued on in this case was a valid and binding mortgage and created a lien upon the *'right of way'* and the *'alternate sections of land'* granted to that road by the Act of Congress of March 3, 1871."

Yet nowhere in the brief do we find any direct reference to the decree of the United States Circuit Court for the Eastern District of Louisiana, wherein it was adjudged, among other things

> "that the mortgage made on behalf of the New Orleans, Baton Rouge and Vicksburg Rail-

road Company by Calvin H. Allen, appearing as its President before T. J. Beck, notary, at New Orleans, September 4, 1872, unto the Union Trust Company of New York * * * did not and does not cover, attach to, mortgage, hypothecate or affect the lands patented by the United States to the New Orleans Pacific Railway Company, March 3, 1885, under said Act of Congress of March 3, 1871, Chapter 122, or any part thereof, or any of the lands patented to the said New Orleans Pacific Railway Company since March 3, 1885, under said Acts of 1871 and 1887 or selected or due under said laws, and creates no lien thereon or right in or to the same or any part thereof" (Record, pp. 311, 312).

The Texas and Pacific Railway Company was not a party to the above-mentioned suit, but, as it is now sued upon an alleged liability of the New Orleans Pacific Company it is entitled to plead in bar any decree which would be available to the New Orleans Pacific Company as the primary debtor (*United States* vs. *Allsbury,* 4 Wall. 186).

The only question, therefore, is whether the decree is binding upon the plaintiffs who were not parties to the suit excepting in so far as they were represented therein by the mortgage trustee.

It appears that the Union Trust Company, as trustee of the alleged mortgage of September 4, 1872, was named as one of the parties defendant to the suit; that process of subpœna was duly issued and served upon it according to law and the orders of the Court; and that upon its failure to appear, a decree *pro confesso* was ordered by Judge PARDEE (Record, p. 301).

That a decree so rendered binds not only the

mortgage trustee but also the individual bondholders, is well settled by the authorities:

*Kerrison* vs. *Stewart,* 93 U. S. 155.
*Shaw* vs. *Little Rock and Ft. Smith Railroad Company,* 100 U. S. 605.
*Richter* vs. *Jerome,* 123 U. S. 233.
*Beals* vs. *Illinois, Missouri and Texas Railway Company,* 133 U. S. 290.

The case of *Raphael* vs. *The Wasatch and Jordan Valley Railway and others,* 201 Fed. Rep. 854, recently decided by the Circuit Court of Appeals for the Eighth Circuit, is directly in point in all of its fundamental features.

From that case it appears that Nathaniel W. Raphael, as holder of certain alleged bonds of the Wasatch and Jordan Valley Railway Company, brought suit for the foreclosure of a mortgage alleged to secure the said bonds, naming the trustee as one of the parties defendant. The trustee was duly summoned but failed to appear, suffering a default, and a decree was thereafter rendered in the action holding the mortgage sued on to be ineffectual. Raphael died after entry of the decree, and his bonds passed to his son by operation of law. Subsequently his son purchased in the open market six bonds of the same series as those involved in the suit unsuccessfully prosecuted by his father. He thereupon proceeded as holder of the bonds acquired from his father, as well as those purchased subsequently, to relitigate the question involved in the earlier suit; and the decree in the earlier suit having been pleaded in bar the plea was held good on the theory that all holders of bonds issued under the mortgage to the Union Trust Company were bound by its default in the

suit brought by Nathaniel W. Raphael, to the same extent as if the Trust Company had appeared in the action. District Judge W. H. MUNGER, speaking for the Court said (p. 587):

> "As to the remaining 6 bonds, which he has subsequently purchased, he is equally bound by that decree, for the reason that the Union Trust Company, trustee of the mortgage, was a party to that action and bound by the judgment therein. It being a party to that action he as beneficiary is equally bound. In *Woods* v. *Woodson,* 100 Fed. Rep., 515-519, Judge THAYER, writing the opinion for this Court, said: 'It is further claimed in behalf of the appellant that the decree against The Farmers' Loan & Trust Company adjudging the invalidity of the joint deed of trust is not binding upon him, because he was not a party to the suit in which the decree was rendered, even if it was binding upon his trustee, The Farmers' & Trust Co., who was duly served with process. This point, however, must be ruled against the appellant on the strength of the following cases: *Beals* v. *Railroad Co.,* 133 U. S. 290; *Kerrison* v. *Stewart,* 93 U. S. 155; *Shaw* v. *Railroad Co.,* 100 U. S. 605; *Richter* v. *Jerome,* 123 U. S. 233; and especially on the strength of the decision in *Beals* v. *Railroad Company,* which is on all fours with the case in hand. In the latter case a bill was filed against the trustee in a deed of trust to cancel the same, but the complainant, Beals, who was a bondholder, was not made a party thereto. Nevertheless, it was ruled that the bondholders were parties by representation and that a decree cancelling the mortgage was obligatory upon the bondholders as well as upon their trustee.' In addition to the cases cited in the excerpts from the opinion of Judge THAYER, see *Farmers' Loan & Trust Co.* v. *Kansas City, etc., Co.,* 53 Fed. Rep. 182, 185; *Heckman* v. *U. S.,* 244 U. S. 413."

Under the above authorities, the appellants and their predecessors in the ownership of the alleged Baton Rouge bonds are bound by the decree against the Union Trust Company to the same extent as if they themselves had been parties defendant; and we fail to see how the appellants can litigate anew questions covered by the former adjudication.

## IV.

**The mortgage of the New Orleans, Baton Rouge and Vicksburg Railroad Company alleged to have been executed September 4, 1872, was inoperative as a lien upon the land grant lands afterwards patented to and acquired by the New Orleans Pacific Railway Company.**

As discussion of the fundamental questions raised by the appellants seems foreclosed by the decree which the appellee has pleaded in bar of the suit, counsel are content in conclusion to deal very briefly with the merits of the controversy.

(a) *The Act of Congress granted to the Baton Rouge Company or its assigns no title to the specific lands, but merely a right in the nature of an assignable chose in action to acquire title to specific lands by fulfilling the conditions of the grant.*

The cardinal error of the appellants lies in their assumption that the Act of Congress "vested in the Baton Rouge Company a valid title in fee to the lands granted".

It has already been shown that under Section 9 of the Act of Congress no title to specific lands vested until the projected railroad was "definitely fixed", and in the meanwhile the grant was as stated above, a mere chose in action.

*Missouri, Kansas and Texas Railway Company* vs. *Kansas Pacific Company*, 97 U. S. 491.

*Van Wyck* vs. *Knevals*, 106 U. S. 360.

Opinion of Attorney General Brewster, *supra*.

(b) *The filing by the Baton Rouge Company of maps indicating the general route of its road and the withdrawal from pre-emption and homestead entry of lands coterminus with the route, did not vest the Baton Rouge Company with title to the lands withdrawn or any part thereof.*

The maps filed by the Baton Rouge Company in the Department of the Interior, one of which antedated the alleged mortgage of September 4, 1872, were maps of general location filed pursuant to Section 12 of the Act of Congress. The filing of such a map in advance of definite location was authorized to protect the Company against wholesale entries made by prospective settlers following the trail of the Company's civil engineers. It permitted the withdrawal of lands from homestead entry, but conferred no new or additional rights upon the Baton Rouge Company.

*Kansas Pacific Railway Company* vs. *Dunmeyer*, 113 U. S. 629.

*Buttz* vs. *Northern Pacific Railway Company*, 119 U. S. 55.

*U. S.* vs. *Southern Pacific Company*, 146 U. S. 570, particularly p. 599.

(c) *The Baton Rouge Company having assigned its rights under the Act of Congress without definitely locating or constructing any part of its road, never acquired title to specific lands.*

It is settled by the rulings of the Interior Department and by the decisions of the Supreme Court, that title to the lands remained in the United States until it passed to the New Orleans Pacific Company upon the filing by the latter Company of its maps of definite location.

*U. S.* vs. *New Orleans Pacific Railway Company,* 124 U. S. 24.

*New Orleans Pacific Railway Company* vs. *Parker,* 143 U. S. 42.

Opinion of Attorney General Brewster, *supra.*

(d) *At the date of the execution of the alleged mortgage of September 4, 1872, the Baton Rouge Company had no power to mortgage after-acquired land grant lands.*

Even though the Baton Rouge Company had located its line of railroad and had constructed the same and had received patents for the granted lands, the alleged mortgage of September 4, 1872, would not have become a lien upon the lands; at that date the Company had no power to mortgage after-acquired property not appurtenant to its line of railroad.

*Revised Code of Louisiana,* Section 3308.

*New Orleans Pacific Railway Company and others* vs. *Union Trust Company and others,* 41 Fed. Rep. 717.

*New Orleans Pacific Railway Company* vs. *Parker,* 143 U. S. 42.

The Act of the Louisiana Legislature authorizing the Baton Rouge Company to mortgage after-

acquired property did not become effective until December 11, 1872. (Act No. 100 of the Acts of 1873, p. 293; Testimony of the Secretary of State of the State of Louisiana, record, p. 219.)

(e) *Even assuming that the granted lands had vested in the Baton Rouge Company, its title would have been cut off and extinguished by the Act of Congress approved February 8, 1887, which had the legal effect of a new grant.*

The above construction was placed upon the Act of March 3, 1876, by the Supreme Court of the United States in *United States* vs. *New Orleans Pacific Railway Company*, 124 U. S. 24. The Act of February 8, 1887, is *in pari materia* (24 Stat. at Large, 391).

In accepting the new grant made by the Act of February 8, 1887, the New Orleans Pacific Company did not assume any indebtedness of the Baton Rouge Company, but only such "duties and obligations" as were imposed upon it *by the Act of March 3, 1871.* The only "duties and obligations" imposed upon the Baton Rouge Company by the Act of March 3, 1871, were those relating to the opening of the lands for settlement and preemption, all of which were fully discharged by Messrs. Dillon and Alexander or their successors as trustees of the New Orleans Pacific Land Grant Mortgage.

(f) *The alleged mortgage of September 4, 1872, does not constitute a lien upon the rights of way of the railroad acquired by the Texas and Pacific Railway Company from the New Orleans Pacific Railway Company.*

The grant of a right of way to the Baton Rouge Company by Section 22 of the Act of March 3,

1871, was subject to the condition that its road should be constructed and used for the purposes designated (*St. Joseph and Denver City Railroad Company* vs. *Baldwin,* 103 U. S. 426).

The Baton Rouge Company never constructed any road or acquired any right of way to which its alleged mortgage could attach (*New Orleans Pacific Railway Co.* vs. *Parker,* 143 U. S. 42).

The undisputed evidence shows that the New Orleans Pacific Railway Company constructed its road through a settled country and acquired its entire right of way by purchase from the property owners, excepting a few miles—not exceeding 15—where the lines passed through unoccupied land, mostly swamp land and of no value. The evidence further shows that the Texas and Pacific Railway Company has been in open and notorious possession of the entire line between New Orleans and Shreveport for more than thirty years (Record, p. 315).

## Conclusion.

## V.

In support of the propositions of law and the authorities cited in support thereof, we respectfully submit the following argument on the part of the Texas and Pacific Railway Company.

In order to arrive at a clear understanding of appellant's case, we will give a short résumé of the undisputed facts upon which the appellant bases whatever cause of action he may have.

The plaintiff-appellant in this case is David J

Waller, Jr., and Levi E. Waller, Trustees under the Last Will and Testament of David J. Waller, deceased.

The parties named by the plaintiff as defendants in the Court below to this cause of action were The Texas and Pacific Railway Company, The New Orleans Pacific Railroad Company, and the Union Trust Company of New York.

The bill was dismissed before final hearing as to the Union Trust Company of New York. No subpœna has ever been issued, served or returned as to the New Orleans Pacific Railroad Company, so that the New Orleans Pacific Railroad Company has never been made a party to the record nor does the decree undertake to adjudicate any of its rights or liabilities in this case.

This leaves the record with the appellants named as plaintiffs in the Court below, and the Texas and Pacific Railway Company, as sole defendant.

The New Orleans, Baton Rouge and Vicksburg Railroad Company was incorporated under the Laws of Louisiana, in 1869. By the Twenty-second Section of an Act of Congress passed March 3rd, 1871, Chapter 122, 16th Statute, it was provided as follows:

> "SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have right to connect by the most eligible route to be selected by said company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad

> Company at its eastern terminus, there is hereby granted to said Company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California to said Texas Pacific Railway Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railway Company, within said State of California: Provided, that said Company shall complete the whole of said road within five years from the passage of this act."

By Section Nine of the same Act there was granted to The Texas and Pacific Railway Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said Railroad in California.

Section Twelve of the same Act provides as follows:

> "SEC. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad, and put it in running order as a first class road in all its appoitments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and conterminus with said completed road to which shall be entitled for each section so completed. Said company, within two years after the passage of this Act, shall designate the general route of its said road as near as may be, and it shall file a map of the same

in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from pre-emption, private entry and sale; Provided, however, That the provisions of the act of September, eighteen hundred forty one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act to Secure Homesteads to actual settlers under public domain' approved May twenty, eighteen hundred sixty two, and the amendments thereto, shall be and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said Company."

On the 11th day of November, 1871, the New Orleans, Baton Rouge and Vicksburg Railroad Company filed in the Department of the Interior a map of the general route of its road from Baton Rouge to Shreveport, and on the 13th day of February, 1873, a like map showing the general route of its road from New Orleans to Baton Rouge, and with the exception of filing these maps, the New Orleans, Baton Rouge and Vicksburg Railroad Company did absolutely nothing in the matter of carrying out the express conditions of the Land Grant, as embodied in said Section 22.

In 1871 and 1873 the lands along the general route as shown in the map filed with the Department of the Interior within the grant of the act of March 3, 1871, were withdrawn from entry and sale by Order of said Department.

On the 4th day of September, 1872, the New Orleans, Baton Rouge and Vicksburg Railroad

Company executed a mortgage for the purpose of securing a first mortgage seven per cent. Land Grant and Sinking Fund Gold Bond; said mortgage being to the Union Trust Company, Trustee. The amount of the gold bonds sought to be covered by this mortgage were twelve thousand bonds each for the denomination of one thousand dollars. This mortgage undertook to cover all of the land grant rights that the New Orleans, Baton Rouge and Vicksburg Railroad Company might receive under Section 22 of the Act of March 3rd, 1871.

At the date of the execution of this mortgage, the New Orleans, Baton Rouge and Vicksburg Railroad Company had taken no action to carry out the terms of the Land Grant Act except to file in the Department of the Interior a map of the general route of its road, and it has never undertaken to carry out any of the provisions of the said Land Grant Act other than the filing with the Department of the Interior a map of the general route of its road from Baton Rouge to Shreveport, and a like map showing the general route of its road from New Orleans to Baton Rouge.

It has never undertaken to construct this line of road, in fact it never commenced in any way the construction of its line of road.

The appellants herein allege that they are the owners of thirty of the bonds issued under the Mortgage of September 4th, 1872. How they became the owners of same and for what purpose these bonds were issued, it does not appear.

On the 5th day of January, 1881, the New Orleans Pacific Railroad Company became the owner, by conveyance from the New Orleans, Baton Rouge and Vicksburg Railroad Company, of all its interest in such grant of public lands, and this conveyance,

or assignment of its rights was accepted by the New Orleans Pacific Railroad Company and the conveyance and its acceptance were duly recognized by the Department of the Interior.

The conveyance of this right to the New Orleans Pacific Railroad Company was in the following terms:

> "This indenture, made the 5th day of January, one thousand eight hundred and eighty one between the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corporation created and existing under and by virtue of a special act of the Legislature of the State of Louisiana, approved December 30, 1869, party of the first part, and the New Orleans Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Louisiana, party of the second part, witnesseth:—
>
> "That the said party of the first part, for and in consideration of the sum of one dollar ($1) lawful money of the United States of America to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is thereby acknowledged, and of other good and valuable considerations, has remised, released and quit claimed, and by these presents does remise, release and quit claim unto the said party of the second part, and to its successors and assigns forever.
>
> "All the right, title, and interest of said party of the first part, its successors or assigns, of, in, or to a certain grant of public lands granted to the said party of the first part by an act of the Congress of the United States, approved March 3, 1871, and entitled "An Act to incorporate the Texas Pacific Railway Company and to aid in the construction of its road, and for other purposes", together with all and singular the tenements, hereditaments and appurte-

nances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

"To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

"In witness whereof the said party of the first part hath caused its corporate seal to be hereunto affixed, and these presents to be signed by its President and Secretary, the day and year first above written."

At the date of this assignment or conveyance, the New Orleans, Baton Rouge and Vicksburg Railroad Company had not complied with any of the conditions of the Land Grant Act, other than the filing of a map of the general route with the Department of the Interior, as above set forth.

The New Orleans Pacific Railroad Company was a railway company incorporated under the laws of Louisiana, with full authority to construct a road between the city of New Orleans and the city of Shreveport in the State of Louisiana, and after having obtained the assignment or conveyance from the New Orleans, Baton Rouge and Vicksburg Railroad Company, and the recognition of same by the Department of the Interior, it proceeded to construct its line of road from Shreveport by way of Alexandria and West Baton Rouge to White Castle, in Louisiana, it having already constructed or obtained, a line from White Castle to the City of New Orleans, making a continuous line from New Orleans to Shreveport. This line of road was within the limits of the land withdrawn for the New Orleans, Baton Rouge and Vicksburg Railroad Company.

Up to this date, and until the 20th day of June, 1881, The Texas and Pacific Railway Company had no connections whatever with any of the above transactions, or with any of the property involved in same. On the 20th day of June, 1881, The Texas and Pacific Railway Company purchased from the New Orleans Pacific Railroad Company its railway between the city of New Orleans and the city of Shreveport; the contract of purchase being in words and figures as follows:

> "This indenture, made this 20th day of June, in the year of our Lord one thousand eight hundred and eighty one, by and between the New Orleans Pacific Railway Company, a corporation created by, and under the laws of the State of Louisiana, party of the first part, and the Texas & Pacific Railway Company, a corporation created by and under the laws of the United States, and having and owning certain franchises under the laws of Texas party of the second part:
>
> Witnesseth, That the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States, to it in hand paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the other and further consideration hereinafter to be mentioned, hath consolidated itself with the party of the second part under its own proper and corporate name of "The Texas & Pacific Railway Company", on the terms and conditions herein and hereby agreed upon, by granting, bargaining, selling, aliening, remising, releasing, conveying and confirming, and by these presents granting, bargaining, selling, aliening, remising, assigning, transferring, conveying and confirming unto the party of the second part, its successors or assigns, all the franchises, corporate rights or privileges of the

said party of the first part, together with its track, roadbed, buildings, rolling stock, engineers' tools, bonds, stocks, grants, privileges, property, real and personal, and every right, title and interest in and to any franchises, or property, real or personal, and all rights, of every name and kind, which the party of the first part has any right, privilege, or interest, situated and being in the State of Louisiana, or in the State of Texas, or elsewhere: The object and intent of this contract and agreement being to so merge the rights, powers and privileges of the party of the first part into the party of the second part, so that the party of the second part, under its own charter, corporate name and organization shall, without impairing any existing right, exercise in addition thereto, all the powers, rights, privileges and franchises, and own and control all the properties that the party of the first part now exercises and owns, or by its charter and by-laws it has the right to exercise, own or control.

Provided, however, that the land and land grants acquired or to be acquired by the party of the first part from the Government of the United States, either directly or indirectly, or from the State of Louisiana, or from the New Orleans, Baton Rouge and Vicksburg Railroad Company, or from any other source, other than lands necessary and needful for railway purposes, are expressly exempted and excluded from the provisions of this contract, and do not pass by any terms or provisions thereof.

And provided further, that the franchises of the party of the first part (to be and remain a corporation until such time as may hereafter be agreed upon for its dissolution) shall not be impaired or infringed upon by anything contained in this contract.

And provided, also, that nothing in this contract contained is intended to, or shall impair any legally existing contract by mortgage or otherwise, of the party of the first part.

The further consideration for this contract and agreement is, that the party of the second part shall receive from the party of the first part, or its shareholders, share for share of its capital stock of one hundred dollars per share, issued or to be issued (not exceeding the rate of twenty thousand dollars per mile, for 400 miles of road, which, it is estimated, will be constructed under the existing franchises of the party of the first part); that is to say: The party of the second part shall deliver to the party of the first part, or to such person as the latter shall direct, or to its stockholders, one share of its capital stock of one hundred dollars per share, for a like amount of the capital stock of the party of the first part now outstanding, when and as transferred to the party of the second part, and as further stock of the party of the first part is issued (not exceeding twenty thousand dollars per mile, as aforesaid) similar exchanges and transfers shall be made until all this stock of the party of the first part (not exceeding the rate per mile as aforesaid) shall have been issued.

Provided that the stock of the party of the first part received by the party of the second part in exchange, under this agreement, shall not be cancelled, but shall be held and used by the party of the second part, for the purpose of preserving to the said second party the enjoyment of all rights and privileges pertaining to the ownership thereof, until otherwise provided by authorized corporate action, the corporate existence of the party of the first part shall be maintained, and its power to carry out all existing contracts, and to mortgage any land grant it has acquired, or may acquire, from the New Orleans, Baton Rouge and Vicksburg Railroad Company, or otherwise, remain wholly unimpaired hereby.

In witness whereof, the parties aforesaid being the contracting parties of the first and second part, have mutually executed this in-

denture, under the corporate seals of the said companies, and attested by the signatures of the proper officers, the day and date above."

It is by virtue alone of the instrument of conveyance made by the New Orleans, Baton Rouge and Vicksburg Railroad Company to the New Orleans Pacific Railroad Company on the 5th day of January, 1881, that the New Orleans Pacific Railroad Company acquired any interest in the land grant of the Baton Rouge Company, or assumed any responsibility or liability, and the terms of that instrument fixed the responsibility and liability of the New Orleans Pacific Railroad Company, if any.

It is by virtue alone of the written instrument executed June 20, 1881, by the New Orleans Pacific Railroad Company to The Texas and Pacific Railway Company that The Texas and Pacific Railway Company acquired any rights in the Railroad of the New Orleans Pacific Company between New Orleans and Shreveport, and this instrument is the Texas and Pacific Railway Company's sole muniment of title as to said property, and this instrument alone fixes the liability or responsibility of the Texas and Pacific Railway Company as to any obligation growing out of said conveyance or growing out of its dealing with the property covered by said conveyance.

In the present cause of action the appellants are seeking to obtain a personal judgment against The Texas and Pacific Railway Company for the face amount of the thirty bonds alleged to be held by the plaintiff with the accrued interest thereon; these bonds, it is alleged, having been issued under mortgage dated September 4th, 1872. This is not a suit to foreclose the mortgage securing said bonds, nor is there any allegation or attempt to enforce the

said mortgage lien in any way. It is not contended that The Texas and Pacific Railway Company was a party to any transaction with the New Orleans, Baton Rouge and Vicksburg Railroad Company either in the issuance of the said bonds or the mortgage securing same. There is no evidence that The Texas and Pacific Railway Company entered into any agreement with the New Orleans Pacific Railway Company except as shown by document of date of June 20th, 1881, above set forth, and this document is clear and express in its terms, and does not in any wise obligate The Texas and Pacific Railway Company to assume any obligation of the New Orleans Pacific Railroad Company or any obligation of the New Orleans, Baton Rouge and Vicksburg Railroad Company, nor does the conveyance or assignment made to the New Orleans Pacific Railway Company of date January 5th, 1881, by the New Orleans, Baton Rouge and Vicksburg Railroad Company obligate the New Orleans Pacific Railroad Company to assume any of the indebtedness incurred or to be incurred by the New Orleans, Baton Rouge and Vicksburg Railroad Company.

Complainants in their bill are undertaking to fix liability upon The Texas and Pacific for the amount of the thirty year bonds and accrued interest by some sort of mythical trust which they allege grows out of the above transactions.

The complainants herein are not undertaking to foreclose the mortgage given by the New Orleans, Baton Rouge and Vicksburg Railroad Company to the Union Trust Company to secure said bonds. If the complainants have any interest in the property covered by the said mortgage, it is only the interest of a lien-holder. Their debt has not been reduced

to judgment as against the original payor, nor have they obtained any rights in the property securing said debt other than the lien of said mortgage.

Since the execution of the Agreement of June 20th, 1881, between the New Orleans Pacific Railroad Company and The Texas and Pacific Railway Company, conveying the railroad of the New Orleans Pacific Railroad Company to The Texas and Pacific Railway Company, The Texas and Pacific Railway Company has been in open and notorious possession of the railroad, operating the same as its own, paying taxes upon same, making extensive and valuable improvements upon same, and is now and at the date of the filing of this suit in possession of same, claiming it adversely as against the world.

At the date of the execution of the mortgage by the New Orleans, Baton Rouge and Vicksburg Railroad Company on the 4th of September, 1872, there was no railroad constructed nor was the construction of any railroad commenced by the Baton Rouge Company.

On the date the New Orleans Pacific Railroad Company acquired the Land Grant of the New Orleans, Baton Rouge and Vicksburg Railroad Company, no road had been constructed or commenced by the New Orleans, Baton Rouge and Vicksburg Railroad Company. Since the acquiring of the property by the New Orleans Pacific Railway Company in January, 1881, and by The Texas and Pacific Railway Company from the New Orleans Pacific Railway Company in June, 1881, a railroad has been completed along the original route and is now in full operation, owned, controlled and managed by The Texas and Pacific Rail-

way Company who have never in any manner recognized the validity of the mortgage issued by the New Orleans, Baton Rouge and Vicksburg Railroad Company in 1872, nor has The Texas and Pacific Railway Company ever assumed any obligation under said mortgage.

No interest has been paid upon the bonds covered by the mortgage issued by the New Orleans, Baton Rouge and Vicksburg Railroad Company in 1872. No demand appears to have been made upon the Trustee, to enforce the provisions of said mortgage for the non-payment of interest. The bonds secured by said mortgage matured according to their face on the first day of September, 1902, and according to the evidence of one of the complainants herein, these bonds were owned by his father about seven or eight years before his death, that his father died December 7th, 1893. The Bill of Complaint in this cause was filed on the 6th day of May, 1913, and no reason is given as to why the father of the complainants herein did not institute suit upon this obligation during his lifetime, nor is any reason given or any fact stated as to why the complainants herein did not institute suit on this obligation until after a period of more than ten years after the maturity of the bonds.

These are the undisputed facts in the case, and although there is a mass of *ex-parte* affidavits, and various letters between individuals and the Department of the Interior concerning the New Orleans, Baton Rouge and Vicksburg Railroad Company's Land Grant, The Texas and Pacific Railway Company is in no wise identified with any of this correspondence, it all being prior to the date The Texas and Pacific Railway Company acquired any interest in the New Orleans Pacific Railroad Company.

It is undisputed that The Texas and Pacific Railway Company ever acquired the New Orleans, Baton Rouge and Vicksburg Railroad Company by any instrumest of writing, or by any verbal agreement, or any rights or interest in the franchises of said Railroad, and unquestionably it did not acquire any of the physical properties in the way of a railroad, for the reason that the New Orleans, Baton Rouge and Vicksburg Railroad Company never had any physical properties in the way of a railroad that could be acquired, it never having undertaken to construct a railroad of any kind, and never having located a right of way for a railroad, it had none.

We submit that appellants have cast their case in a very peculiar mould. They are seeking no rights as against The New Orleans, Baton Rouge and Vicksburg Railroad Company, nor as against any of the stockholders of that Company; they are seeking no rights as against the New Orleans Pacific Railroad Company, nor any of the stockholders of that Company. They are not undertaking to obtain a foreclosure of the mortgage of the New Orleans, Baton Rouge and Vicksburg Railroad Company mortgage of 1872, nor are they seeking to subject any of the land grants which they allege was covered by that mortgage to the lien of their alleged mortgage. On the contrary they are seeking a personal judgment against The Texas and Pacific Railway Company, a party who had no connection with the New Orleans, Baton Rouge and Vicksburg Railroad Company mortgage of 1872, no interest in the land grants alleged to be covered by said mortgage and no interest in any of the transactions as between the New Orleans, Baton Rouge

and Vicksburg road and the New Orleans Pacific Railroad.

After waiting for more than forty years after the date of the mortgage and more than eleven years after the maturity of the bonds secured by said mortgage and for more than forty years after the first installment of interest matured on the bonds secured by said mortgage, they do not even proceed against the original maker of the bonds or against the lands alleged to be covered by said mortgage, but proceed against an utter stranger to all of the transactions and seek a personal judgment based upon some mythical trust that in my opinion is unknown to the law. A stronger case of want of diligence and want of conscience, and want of equity could not be presented to the Court.

At the date the New Orleans, Baton Rouge and Vicksburg Railroad Company mortgage was executed, the Baton Rouge Company had done absolutely nothing to acquire the Land Grants. It never performed any of the conditions precedent to the obtaining of the Land Grants. It merely had a floating interest or right to obtain the Land grants, conditioned upon its doing certain things. Until those things were performed by it, no right or title could be vested in it as to the Land Grants.

The mortgagees in the Baton Rouge Mortgage could acquire no greater rights than the Baton Rouge Company could acquire. The Baton Rouge Company having failed to perform the conditions required of it, those rights were forfeited to the Government and were assigned to the New Orleans Pacific Railway Company in the place and stead of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and the New Orleans Pacific

Company performed the conditions that should have been performed by the New Orleans, Baton Rouge and Vicksburg Railroad Company. The mortgagees in the New Orleans, Baton Rouge and Vicksburg Railroad Company mortgage never acquired anything as there was nothing for them to acquire.

The Texas and Pacific Railway Company never acquired any interest in the Land Grants, never assumed any of the obligations of the New Orleans Pacific Railway Company in connection with the land grants, never assumed any of the obligations of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and the only foundation upon which the complainants could in any wise predicate liability upon the part of the Texas and Pacific Railway Company is the fact that it acquired a Railroad between New Orleans and Shreveport which operated in the general direction that a line of road would have been operated had the Baton Rouge Company carried out its agreement with the Government.

The Texas and Pacific Railway Company has spent millions of dollars on this property, has operated it, claiming it adversely as against the world. Its operations has been open and notorious. No demand has ever been made upon it prior to the institution of this suit for the payment of either interest or principal of the New Orleans, Baton Rouge and Vicksburg Railroad Company bonds issued in 1872. No explanation is given or undertaken to be given by the complainants as to why they delayed bringing this suit for such a great period of time, and why demand has not been made upon the Trustee to bring this suit or why suit had

not been instituted by them for defaulting installments of interest. The complainants in this case have not only slept upon their rights but to use a stronger term have hybernated upon their rights. In seeking to put in motion the machinery of a Court of Equity they do so with unclean hands. In asking a Court of Equity to engraft a trust upon transactions that happened forty years ago and more than thirteen years after every possible obligation had matured; when the status of parties had changed; when property that did not really exist in the New Orleans, Baton Rouge and Vicksburg Railroad Company had become worth millions of dollars in the hands of The Texas and Pacific Railway Company with other securities issued against it, they are not in a position to invoke the activity of a Court of Equity, to disturb such conditions, or open up transactions that have long since been closed. They have slumbered too long and their hands are not clean.

No allegation of fraud and no evidence of fraud upon the part of The Texas and Pacific Railway Company is charged or established. No suppression of facts are shown in the Record. Every transaction on the part of The Texas and Pacific Railway Company in connection with its line of road between New Orleans and Shreveport was open; its status established by instruments of writing which were duly recorded in accordance with the laws of the States through which the road operates; the possession of the Texas and Pacific Railway Company has been open and notorious; its conduct in connection with the property has been clean; and yet in the face of these facts, complainants seek to put the machinery of a Court of Equity in motion

to disturb all these conditions without any allegations or evidence of good faith to excuse their neglect to assert whatever rights they may have had years before.

And the learned Circuit Court and the learned District Court were prompted by these very facts in holding that the complainants had been guilty of such gross laches that their cause of action could not be maintained.

The maxim in Equity of *"Vigilantibus non dormientibus æquitas subvenit"* could not be invoked in a stronger cause, and we respectfully ask that this bill be dismissed.

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